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No. 86-354 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1986

STEWART G. HUBER, ET AL., PETITIONERS

v.

UNITED STATES MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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1986

QUESTION PRESENTED

Whether the rule of *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), precludes the Merit Systems Protection Board from refusing to order reinstatement of non-preference-eligible excepted-service employees who are separated in a removal action that is improperly labeled a reduction-in-force by their employing agency.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 793 F.2d 284. The opinion and order of the Merit Systems Protection Board (Pet. App. 10a-20a) is unofficially reported at 28 M.S.P.R. 17. The opinion and order of the administrative law judge (Pet. App. 21a-47a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1986. The petition for a writ of certiorari

was filed on September 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

STATEMENT

1. Petitioners are eight former employees of the Department of Agriculture. Prior to May 1981, when they were separated from their jobs, petitioners held appointments either as State Directors of the Farmers Home Administration (FmHA), or as State Executive Directors of the Agricultural Stabilization and Conservation Service (ASCS). Both of those agencies are components of the Department of Agriculture. Pet. App. 22a.

Petitioners' former positions were "Schedule A excepted service" appointments (Pet. App. 22a). "Excepted service" appointments are those which generally lack the job-tenure rights of competitive civil-service positions. See 5 U.S.C. 7511(a)(1) and 7513. "Schedule A" appointments are excepted service positions "other than those of a confidential or policy-determining character for which it is not practicable to examine" (5 C.F.R. 6.2). Certain "excepted service" employees—*i.e.*, veterans and other "preference eligible" individuals—do enjoy job-tenure rights under 5 U.S.C. 7513, which protects against discharge except for cause. See 5 U.S.C. 7511(a)(1)(B) and 7513(a). Petitioners, however, are not veterans or otherwise "preference eligible" individuals (Pet. App. 46a n.21).

The positions that petitioners formerly held entailed a high degree of executive authority in ad-

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[1] Although the petition states that the "[j]urisdiction of this Court is invoked under 28 U.S.C. § 1254(3)," that appears to be a typographical error.

ministering the government's farm policies. See Pet. App. 27a-28a, 32a. Since the early 1950s, when these positions were removed from the competitive service and placed in Schedule A, "incumbents of th[e]se positions had usually been replaced with each change in administration" (*id.* at 24a n.4). Non-veteran employees like petitioners, who enjoyed no job-tenure protection, had traditionally "been dismissed summarily" (*ibid.*). Veteran and other preference-eligible employees, who did enjoy job-tenure protection, "had usually been reassigned to other positions with the same grade and pay" if they refused to resign upon request (*ibid.*). When petitioners accepted their appointments as state directors, they were advised that "they would not have the tenure rights of competitive service employees" (*ibid.*).

In March 1981, the President issued an Executive Order directing that petitioners' positions be reclassified from Schedule A to Schedule C of the excepted service. Exec. Order No. 12,300, 46 Fed. Reg. 18683 (1981). Schedule C covers positions "of a confidential or policy-determining character" (5 C.F.R. 6.2). It was expected that this reclassification would more clearly reflect the confidential, policymaking nature of the state directorships and make incumbents of those positions—both veteran and non-veteran—subject to summary removal (Pet. App. 25a).

The Department of Agriculture believed that the Executive Order effected a "reorganization [or] reclassification due to change in duties" (5 C.F.R. 351.201(a)) and accordingly applied the reduction-in-force (RIF) rules of the civil service regulations (Pet. App. 26a). On March 25, 1981, petitioners and the other incumbent directors were notified that, as a result of the Executive Order, their Schedule A

positions would be reclassified to Schedule C and, furthermore, that they would be separated from those positions by a reduction-in-force, effective May 1, 1981 (*id.* at 2a, 22a, 25a-26a). Petitioners were further advised of their right to appeal the RIF to the Merit Systems Protection Board pursuant to 5 C.F.R. 351.901, which provides that such appeals may be taken by any employee "who has been affected by a reduction-in-force action and who believes that this part has not been correctly applied." Pet. App. 2a, 22a.

2. Petitioners and 24 other incumbent directors, the latter being veterans, appealed their separations to the Board (Pet. App. 22a). An administrative law judge (ALJ) found merit in their contention that they had not been separated by a valid reduction-in-force (*id.* at 26a-34a). Based on a comparison of the old Schedule A and the new Schedule C position descriptions, the ALJ found it "inescapable that there was no reorganization and no reclassification" within the meaning of the RIF regulations and, hence, that "the RIF action was invalid" (*id.* at 34a (footnote omitted)). The ALJ also found, as petitioners and the other incumbent directors had urged, that "the actions taken against [them] were based on reasons personal to them—essentially, not being 'qualified' for the confidential and policy-related responsibilities involved" (*ibid.*). The ALJ accordingly concluded that the separations had to be "viewed as removals 'for cause,' rather than as reductions in force" (*ibid.*).

On the question of remedy, the ALJ held that the 24 veteran ("preference eligible") employees were entitled to be reinstated and paid back wages, reasoning that they had been separated without receiving

the procedural protections to which the Civil Service Reform Act, 5 U.S.C. 7511-7513, entitled them (Pet. App. 39a-44a). The ALJ refused, however, to grant similar relief to petitioners, concluding that "their appeals are not within the Board's jurisdiction" (*id.* at 46a). Although "[n]on-veteran appellants may appeal agency action taken in a true reduction in force" (*id.* at 44a; see 5 C.F.R. 351.202 and 351.901), the ALJ pointed out that the purported reduction-in-force involved here was in reality "a removal action personal to [petitioners]" (Pet. App. 44a). And since petitioners, as non-preference-eligible employees in the excepted service, were excluded from the job-tenure protections of 5 U.S.C. 7513, and hence could be removed without cause, the ALJ concluded that they "have no right to appeal their removal before this Board" and that their appeals "must therefore be dismissed" (Pet. App. 44a, 46a).

3. On cross-petitions for review, the Board upheld the ALJ's disposition of the various appeals (Pet. App. 10a-20a). The Board agreed that all appellants had been subjected to a removal action rather than to a RIF, that the preference-eligible employees had not received the statutory process due them prior to their separations, and hence that the 24 veterans were entitled to reinstatement and back pay (*id.* at 12a-18a). The Board also agreed that petitioners' appeals "were properly dismissed" (*id.* at 19a), although its reasoning differed somewhat from the ALJ's. Petitioners pointed out that the Board technically had "jurisdiction" of their appeals "because they were removed as a result of the application of RIF regulations, [which] provide a right of appeal to the Board" (*id.* at 18a). The essence of petitioners' argument was that the Board, in declaring a remedy,

could not go behind the reduction-in-force rationale invoked by the agency for dismissing them, so that, upon finding the RIF invalid, the Board assertedly had no alternative but to order the RIF reversed and petitioners reinstated. See Pet. App. 18a-19a.

The Board squarely rejected the latter argument. It agreed that a reviewing body generally " 'must judge the propriety of * * * [agency] action solely by the grounds invoked by the agency' " (Pet. App. 18a, quoting *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947) (*Chenery II*)). But the Board nevertheless concluded that it had authority independently to determine whether an employee's separation was attributable to a RIF or constituted a removal action, and, upon finding the latter, to "examine[] the appellants' 'tenure rights' before determining what disposition was proper" (Pet. App. 18a-19a). Since petitioners, as "non-preference eligibles," had no job-tenure rights which the Board could enforce (*id.* at 19a), the Board held that the ALJ had correctly declined either to order petitioners reinstated or to remand to the agency for reimplementation of the separation decisions. *Id.* at 18a-19a, citing *Horne* v. *MSPB*, 684 F.2d 155 (D.C. Cir. 1982).

4. The court of appeals unanimously affirmed (Pet. App. 1a-9a). While the court acknowledged that a reviewing body ordinarily may not " 'affirm [an] administrative action by substituting what it considers to be a more adequate or proper basis' " (*id.* at 6a (quoting *Chenery II*, 332 U.S. at 196)), it found that Congress has " 'empowered [the Board] to determine when abuses or violations of law have occurred' " and that this power includes the authority "to review the form of agency actions to determine whether they [are] * * * RIF actions" (Pet.

App. 7a, quoting S. Rep. 95-969, 95th Cong., 2d Sess. 24 (1978)). Indeed, the court noted that recharacterization of the separations as adverse dismissals rather than as RIF actions "was the result urged by all the appellants before the Board" (Pet. App. 6a). The court concluded that *Chenery II* did not require the Board "to accept the agency's denomination of its action as a RIF for jurisdictional and relief purposes, even if this denomination is found by the Board to be erroneous" (*id.* at 7a). The court emphasized that "the agency could have separated the petitioners without cause" at any time (*id.* at 9a) and hence that "[t]here were no additional procedural safeguards or steps to which the petitioners could aspire before the agency" (*ibid.*). The court accordingly held that "the Board did not abuse its discretion in declining to remand the matter to the agency to reimplement [petitioners'] separation" (*ibid.*).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or with the decision of any other court of appeals. Further review is not warranted.

1. Petitioners' main contention (Pet. 6-10) is that the decision below violates the principle enunciated by this Court in *Chenery II*. The Court there reaffirmed a "simple but fundamental rule of administrative law"—that the validity of agency action ordinarily must be judged "solely by the grounds invoked by the agency" (332 U.S. at 196). In so stating, the Court referred back to its earlier decision in *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943) (*Chenery I*), where it had explained that a review-

ing body may not "intrude upon the domain which Congress has exclusively entrusted to an administrative agency," and ordinarily must remand to an agency for any "determination of policy or judgment which the agency alone is authorized to make and which it has not made" (*ibid.*). Importantly, however, the Court in *Chenery II* did not express any disagreement with the corollary administrative law principle that it had recognized in *Chenery I*, namely, that a reviewing body may "reinstate a decision which * * * ha[s] already [been] made but which [the reviewing body] conclude[s] should properly be based on another ground within the power of the [reviewing body] to formulate" (318 U.S. at 88). This corollary principle, the Court explained in *Chenery I*, allows reviewing bodies to avoid "wasteful" expenditures of administrative resources by needless remands (*ibid.*).

The decision in this case follows straightforwardly from the corollary administrative law principle stated in *Chenery I*. The court below found that Congress has empowered the Board, for jurisdictional and remedial purposes, to "review the form of agency actions to determine whether they were proper RIF actions" (Pet. App. 7a). On that basis, the court of appeals held that the Board had properly recharacterized the Department's RIF as a removal action for purposes of determining its authority to provide relief (*id.* at 7a-8a). The court then concluded that the Board had properly refused to provide petitioners the same relief (reinstatement and back pay) that it had granted the 24 veterans, since "[p]etitioners, as excepted service employees without preference eligibility, could have been removed at any time, with or

without cause" (*id.* at 8a). And the court further concluded that the Board had not abused "its discretion in declining to remand the matter to the agency to reimplement [petitioners'] separation[s]," since "[t]here were no additional procedural safeguards or steps to which the petitioners could aspire before the agency" (*id.* at 9a). On these facts, the court correctly concluded that the Board had correctly declined to order the relief requested by petitioners and that a remand to the Department of Agriculture would only have produced the wasteful expenditure of agency resources that the Court in *Chenery I* had admonished reviewing bodies to avoid. *Ibid.* (citing *Chenery I*, 318 U.S. at 88).

Petitioners seek to undermine this straightforward application of the corollary administrative law principle recognized in *Chenery I* by suggesting (Pet. 5-10) that the court below held the *Chenery II* principle—*i.e.*, the rule that a reviewing body should not affirm agency action on the basis of reasons the agency has not articulated—to be applicable only to courts, and not to administrative tribunals. Petitioners misread the decision below. The court of appeals expressly acknowledged that the *Chenery II* rule is binding on all reviewing bodies, administrative and judicial. See Pet. App. 6a-7a, 9a. The court merely held that *Chenery II* did not require the Board to accept the agency's denomination of its action as a RIF for relief purposes, where petitioners urged, and the Board found, that that denomination was erroneous (Pet. App. 7a). Congress authorized the Board to make that determination, and the Board, having determined that petitioners were removed, rather than subjected to a RIF, correctly held that they had no additional rights which the Board could require

the agency to provide. See *id.* at 9a (citing *Chenery I*, 318 U.S. at 88).[2]

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[2] Petitioners' subsidiary argument (Pet. 6-7) that the decision below conflicts with this Court's decision in *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), and with the District of Columbia Circuit's decision in *Horne* v. *MSPB*, 684 F.2d 155 (1982), is also in error. Those cases do not suggest, much less hold, that the *Chenery II* rule precludes an administrative tribunal like the Board from affirming an employing agency's action on the basis of an independent statutory power granted by Congress.

In *Vitarelli*, the Secretary of Interior discharged a non-preference-eligible employee for "national security" reasons. The court of appeals affirmed that discharge, notwithstanding the Secretary's failure to follow the procedural standards applicable to "national security" removals, because the Secretary could have summarily discharged the employee without providing him any explanation whatsoever. 253 F.2d 338, 342 (D.C. Cir. 1958). This Court reversed, holding that, when an agency's regulations provide that it must follow certain procedures before terminating an employee for a specific reason, a reviewing body may not relieve the agency of its obligation to follow those procedures just because the agency could have terminated the employee for some other reason. 359 U.S. at 539-540; see also *id.* at 546 & n.9. Here, of course, the Board has not relieved the Department of any procedural obligations, since the Department fully provided petitioners with the procedural protection set forth in the RIF regulations (*e.g.*, the 30-day notice period), and since the Department is not required to provide petitioners, who were at-will employees, with any other procedural protections against removal. In any event, the court below found that Congress has granted the Board independent authority to ignore the form and to determine the substance of an agency's employment action; in *Vitarelli*, there was no suggestion that Congress had provided the federal courts with any similar independent authority.

In *Horne*, the ICC demoted and reassigned two career attorneys without following formal RIF procedures. The Board found that the agency had implemented a *de facto* RIF, but refused to remand to the agency for disposition by

2. Petitioners next contend (Pet. 10-13) that the decision below allows the Board to depart from its prior practice of taking "jurisdiction" of appeals of this sort. Petitioners assert that the Federal Circuit's ruling is a "Catch-22 holding" (Pet. 15) that "will deprive hundreds of thousands of federal employees who are not protected by the veterans' preference laws of the right to appeal from abuses of the reduction-in-force authority" (Pet. 10). These assertions are quite mistaken.

As noted above, OPM regulations allow both "preference-eligible" and "non-preference-eligible" employees affected by a RIF to appeal to the Board if they believe that RIF procedures have not been correctly applied. See 5 C.F.R. 351.901. The Board in the instant case took "jurisdiction" of petitioners' appeal in the sense that it adjudicated the merits of their claim that their separations were not attributable to a valid RIF but rather were removal actions. As both the court below (Pet. App. at 7a) and petitioners themselves (Pet. 12 & n.10) have noted, however, the Board has previously reviewed the form of an agency's separation decision to determine whether a RIF or a removal action has actually occurred. In this re-

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formal RIF procedures because "the ICC's failure to conduct a formal RIF had not injured" the employees (684 F.2d at 157). The court of appeals reversed. It agreed that the Board could recharacterize the ICC's action, but held that a remand for disposition by formal RIF procedures was required. See *id.* at 157-158. The court noted, however, that "[a] remand would be unnecessary if [the employees] had [had] no job tenure rights" (*id.* at 158). Thus, *Horne* directly supports the Board's approach in this case, where, after recharacterizing a nominal RIF as a removal action, the Board declined to remand because petitioners had no job-tenure rights.

gard, therefore, the Board's decision does not depart in any way from its prior practice.

The ALJ, the Board and the court of appeals declined, however, to award petitioners the relief that they requested—reinstatement and back pay—because petitioners, unlike the 24 preference-eligible veterans, were at-will employees who had "no rights under 5 U.S.C. 7511-7513 which the Board [could] enforce" (Pet. App. 19a), and, in reaching this conclusion, the ALJ may have used the term "jurisdiction" in a somewhat ambiguous fashion. His action could be described as a decision that petitioners' claims in essence were adverse removal claims and that the Board lacked jurisdiction of such claims made by persons (like petitioners) who are not preference-eligible. Alternatively, the ALJ's action could be described as a decision that petitioners had failed to state a claim on which relief could be granted, since petitioners had received all protection provided by the RIF regulations and had no job-tenure rights, making the agency's erroneous characterization of their separations as a RIF a *damnum absque injuria.* This ambiguity is what causes petitioners to accuse the Board of departing from its prior practice.

In our view, it makes little difference which way the ALJ's action is characterized. The bottom line reached by the ALJ, the Board, and the court of appeals is that petitioners were entitled to no relief. That bottom line is clearly correct. Since the early 1950s, non-veteran incumbents of petitioners' positions had either resigned or been dismissed upon changes in administration (Pet. App. 24a n.4). Like their predecessors, petitioners could have been removed by the Department of Agriculture, with or without cause, at any time. Petitioners had no job-retention rights under the statute, and they gained

no greater job-retention rights by virtue of the agency's having mischaracterized their separation as a RIF. Since they also erroneously received the benefit of the RIF regulations (e.g., the 30-day notice period), they simply had no claim to any additional relief of any type.

3. Petitioners say that the decision below produces "irrational" and "arbitrary" distinctions between veteran and non-veteran employees (Pet. 10, 13-15). But the Board's decision simply implements the RIF regulations and the adverse-removal provisions of the statute, which themselves vary the coverage provided to preference-eligible and non-preference-eligible individuals in the excepted service. The RIF regulations deal with actions directed solely at a position within an agency and, under the regulatory scheme, cover all excepted-service employees—veteran and non-veteran—who occupy that position. See *Grier* v. *Department of Health and Human Services*, 750 F.2d 944, 945 (Fed. Cir. 1984); see also 5 C.F.R. 351.201 (a), 351.202 and 351.901. In contrast, the adverse-removal provisions of the statute deal with actions directed at particular employees and, under the statutory scheme, cover only veteran and other preference-eligible persons in the excepted service. See *Fiorentino* v. *United States*, 607 F.2d 963, 966 (Ct. Cl. 1979), cert. denied, 444 U.S. 1083 (1980); see also 5 U.S.C. 7511(a)(1)(B). The hypothetical cases that petitioners describe and criticize (Pet. 13-14) reflect the fact that non-preference-eligible employees in the excepted service are covered by the RIF regulations but not by the removal provisions. Thus, when petitioners complain that the Board's decision will produce "irrational" and "arbitrary" results, what they really mean is that, in cases where an agency has mistakenly labeled a removal a RIF, the Board's approach—which treats all substantive RIF actions as RIF ac-

tions and all substantive removal actions as removal actions—will foreclose them from receiving procedural protections against adverse removal that, by statute, they are not entitled to receive anyway.[3] Unfortunately for petitioners, it is not for the Board or this Court to alter that legislative choice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] As we have explained in more detail in our pending petition for a writ of certiorari in *United States* v. *Fausto*, No. 86-595, Congress clearly barred non-veterans in the excepted service from obtaining review by the Board of adverse personnel actions not involving reductions-in-force. The Federal Circuit so held in *Fausto* (see 86-595 Pet. App. 27a), and that question is not at issue in that case. Rather, the issue in *Fausto* is the different question whether a non-veteran excepted-service employee may obtain review of an adverse personnel action in the Claims Court pursuant to the Tucker Act, 28 U.S.C. 1491, even though it is clear that Congress barred him from obtaining review by the Board.

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